PROVINCE-WIDE BARGAINING IN THE CONSTRUCTION INDUSTRY

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IN THE CONSTRUCTION INDUSTRY

I am very pleased to have this opportunity to participate personally in this labour relations seminar for the members of the Ontario Sheet Metal and Air Handling Group. As far as I know this is the first occasion where the Labour Board has jointly participated with an employer group in a seminar of this nature. A great deal of the credit for this venture should go to Howard Ade who saw the need, quite correctly, for the processes of the Labour Board to become more understandable to those who are affected, either directly or indirectly, by Board decisions. It is my hope that this seminar will serve to increase your understanding of how the Labour Board functions, even if you may not agree with all of the Board's decisions.

I must confess that when Howard approached me about the Board's participation in this seminar I got carried away with my enthusiasm for the idea, and very

rashly agreed to talk about the scheme of province-wide bargaining that now applies in the industrial, commercial, and institutional sector of the construction industry. As any of you who have had the opportunity to read sections 125 to 136 of the Labour Relations Act know, this is not one of the easier topics on your agenda. The statutory language used in some of those sections is sufficiently complex to drive even a tax lawyer to distraction, while the language in some of the other sections appears to leave a number of important questions unanswered.

Despite these comments, I make no apologies for the choice of legislative language. There are good reasons for the complexity of language in some sections, and the vagueness of language that can be found in other sections. The restructuring of collective bargaining for an industry as important as construction is not an easy task. As you will know, there are many

interests at play, both on the employer side and the union side, and these interests had to be taken into account and, to some extent, reconciled. It should be noted that not all of these interest groups supported the general concept of province-wide bargaining, and even those who did support the general concept disagreed to some extent on the details of the scheme. This situation meant that it was necessary to draft some very specific language to confine the scheme to those who were prepared to support the scheme while some language simply had to be left open to later interpretation in order to reach a consensus on some of the mechanics of the scheme.

As you are no doubt aware, the scheme of province-wide bargaining was not created overnight. Back in December of 1974, Don Franks was appointed industrial inquiry commissioner to inquire into bargaining patterns in the construction industry.

After a full and exhaustive inquiry, the commissioner's report was tabled in the Legislature in early June of 1976. This report resulted in further submissions being made to the Minister at that time and, finally, the introduction of a Bill to implement the main recommendations of the Franks Report. Bill 176, as it was known, ran into considerable opposition, primarily because of the provision for a mandatory employer co-ordinating agency and, as a result of this opposition, this first Bill died on the order paper. A modified Bill, eliminating the mandatory co-ordinating agency, was then introduced in 1977. This Bill, known as Bill 22, received a much more favourable response from the construction community. The Bill, which was passed, and came into force on October 27, 1977, provided the basic structure for a system of province-wide bargaining in the industrial, commercial, and institutional sector of the construction industry.

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There are a number of general features of this scheme that should be explained. First, a primary purpose of the scheme was to consolidate bargaining at a provincial level by eliminating local negotiations that had been conducted separately. It was anticipated that the effect of province-wide bargaining would be to reduce some 275 bargaining situations to 30. Instead of bargaining through area or local associations, it was contemplated that the bargaining would take place through provincial organizations.

It should be emphasized, however, that even though the scheme consolidates bargaining rights it does so in a manner that preserves the craft union bargaining pattern prevalent in the construction industry. What the scheme contemplates is province-wide bargaining by trade union and, since there is usually only one craft union per trade, the practical effect is province-wide bargaining by trade. In other words, the scheme

contemplates that an employee bargaining agency would be established for groups of bargaining agents affiliated to the same trade union and whose practice was to bargain separately and apart from other employees. [See section 125(a),(c).] For each employee bargaining agency there would be a matching employer bargaining agency bargaining on behalf of all employers for whom the affiliated bargaining agents of the employee bargaining agency held bargaining rights. [See section 125(d).]

It should also be emphasized that this structure of province-wide bargaining is confined to one sector of the construction industry, the industrial, commercial, and institutional sector of the construction industry, and that it does not apply outside this sector. [see section 125(b).] This sector is not defined in the Labour Relations Act but, rather, the determination of what sector work belongs to is left to be decided by the Labour Board. [See section 135.]

To summarize, the basic elements of the scheme are that it provides for multi-employer bargaining on a province-wide basis; that it provides for single union bargaining, and in most cases, single craft bargaining on a province-wide basis; and that it is confined to only the industrial, commercial, and institutional sector of the construction industry.

Let me describe now some of the mechanics of this basic structure. In order to carry out this scheme it was necessary to vest the bargaining authority of the affiliated bargaining agents, and the corresponding employers, in provincial bargaining agencies. The Act provided for designation of these bargaining authorities by the Minister after consultation with the construction community. [See section 127.] As I understand it, much of this organizational structure already existed so that it was largely a matter of giving these organizations official status as provincial bargaining agencies. Typically a designation of an employer bargaining agency

would provide that a certain organization, or organizations, was the employer bargaining agency for all employers whose employees were represented by a certain group of affiliated bargaining agents. On the employee side, the designation would provide that a certain organization, or organizations, would represent a certain group of affiliated bargaining agents in bargaining.

Once the designation had been made, these bargaining agencies had vested in them by operation of statute [section 130] bargaining rights necessary for the purpose of conducting bargaining and concluding a provincial agreement. [Spiers Brothers Ltd., [1978] OLRB Rep. Sept. 871.] Of even greater significance is the statutory provisions that stipulate that each set of bargaining agencies shall make only one provincial agreement, and that any other kind of arrangement is both prohibited, and null and void. [See section 133(1),(2).] These latter provisions provide the underpinning for the entire scheme of

province-wide bargaining. In order to assure that people stay within the province-wide structure any arrangement inconsistent with this structure is invalidated by operation of law.

While the present scheme for province-wide bargaining does not provide for an agency to co-ordinate the bargaining activity of the various bargaining agencies, it does at least provide the construction community with the opportunity for co-ordination. The statute provides that all provincial agreements are to contain a common expiry date to be calculated bienially from the 30th of April, 1978. [See section 133(3).] In order to deal with the first round of province-wide bargaining in the spring of 1978, it was necessary to enact transitional provisions having the effect of terminating most bargaining agreements as of April 30, 1978. Agreements entered into after January 1, 1977 but before April 30, 1978, were deemed by the statute to expire on April 30,

1978, regardless of any negotiated expiry date or terms for renewal existing in the collective agreement. [See section 132(2).] However, agreements entered into prior to January 1, 1977 were allowed to continue until they expired by operation of their own provisions so as to protect rights vested before the scheme of province-wide bargaining was announced. Most of these agreements expired on April 30, 1978, in any event, and the parties to these agreements were swept immediately into the province-wide bargaining scheme. [See section 132(1).] In the case of the few collective agreements that continued beyond this date, the parties to these agreements did not become bound by the scheme until after their agreement expired.

Once a provincial agreement was reached, by operation of statute [section 134(2)], that provincial agreement was binding upon the two bargaining agencies, all employers represented by the employer bargaining agency, all affiliated bargaining agents represented by

the employee bargaining agency, and the employees represented by the affiliated bargaining agents. Also by operation of statute these bargaining agencies, employers, and affiliated bargaining agents would all be considered parties for the purposes of the arbitration procedure under section 112a. [See section 134(3).]

The reach of a provincial agreement, however, can be extended through the acquisition of bargaining rights. Once an affiliated bargaining agent acquires additional bargaining rights through either certification or voluntary recognition the employers and the employees covered by those bargaining rights then become bound by the provincial agreement. In other words, upon the acquisition of bargaining rights, the employer, the affiliated bargaining agent, and the employees are all plugged into the provincial agreement. By the same token these parties can be unplugged where bargaining rights are terminated, which could occur during the last two months of the provincial agreement.

Having described the more important provisions of this scheme, I will now deal with how the Board has interpreted these statutory procedures since their coming into force in October, 1977. Not surprisingly, interpretative problems did not arrive at the Board's doorstep until the spring of 1978, after the structure had been put in place through the designation process. One of the first issues faced by the Board was the extent to which the transitional provision terminating any collective agreement relating to employees employed in the industrial, commercial, and institutional sector made after January 1, 1977 affected multi-sector agreements also covering employees working in other sectors. [Malen Steel and Salvage Co. Ltd., [1978] OLRB Rep. May 435.]

This issue arose in the context of an application for certification made in respect of all employees covered by an earlier multi-sector agreement. The Board held that this agreement was terminated by the

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transitional provision insofar as it dealt with the ICI sector of the construction industry, but that the agreement continued to operate insofar as it applied to any of the other construction sectors. As a result, the certification application was only timely as it related to those employees employed in the ICI sector so that in the circumstance of this type of displacement application the appropriate bargaining unit had to be one confined to the ICI sector. This approach was followed by the Board in a subsequent decision dealing with the same problem. [Kent Acoustic Lathing and Drywall, [1978] OLRB Rep. July 654.] While these decisions have the effect of leading to some fragmentation of construction bargaining into distinct sectors, it must be kept in mind that this is a natural consequence of the statutory scheme being restricted to only one sector. As a result, the Board was given no authority to terminate the multi-sector agreement insofar as it applied to employees working outside the ICI sector,

and was left with no choice but to define the displacement bargaining unit in terms of only the ICI sector.

Another issue faced by the Board in the early stages of province-wide bargaining was whether the transitional provision, plugging into the provincial agreement those bound by a collective agreement upon its expiry, served to bar a displacement application that in the usual course would have been timely. [Riverside Roofing Ltd., [1978] OLRB Rep. June 567.] In this case the collective agreement had expired on April 30, 1978, and the displacement application was made on May 10, 1978. The Board held that the transitional provision had no application to this situation as its effect was merely to plug in bargaining rights existing at the time when the provincial agreement is made. Up until the point at which the provincial agreement is entered into the normal open periods for displacement application would still apply. In other words, the normal procedure for the acquisition and termination

of bargaining rights at the local level still operate under the scheme of province-wide bargaining.

Once province-wide bargaining began in earnest, the Board was faced with even more difficult questions relating to the extent of the prohibition against arrangements other than a provincial agreement. The interpretation given to this prohibition was bound to have a substantial impact upon the stability of the scheme of provincial bargaining. In the first case raising this issue the Board was faced with a situation where an individual employer and local union business agent during the course of a strike had reached an arrangement having the effect of permitting the employer to resume its work in return for an interim wage increase for its union employees. [See Jen-Mar Construction Ltd., [1978] OLRB Rep. July 647.] While the Board recognized that section 133(2) might not be as specific as section 119, a somewhat parallel provision relating to the scheme for multi-employer

bargaining introduced in 1971, it held that the effect of the new provision was no less restricted in scope. The Board held that the type of arrangement before it violated section 133(2) as it created a local "island of privilege" that was inconsistent with a scheme of province-wide bargaining. While such arrangements are prohibited by the statutory scheme, I should warn you that it is still necessary that they be proved through the Board's evidential process. The Board has on one occasion dismissed a complaint alleging an arrangement other than provincial agreement on the ground that the allegation had not been proven. [Orlando Construction Co., [1978] OLRB Rep. Oct. 942.]

I think that it is fair to say that when the scheme of province-wide bargaining was introduced there existed some illusions, on both the management and labour side, about what it was intended to achieve. The unpopular task of dispelling these illusions fell to the Labour Board as the interpreter

of the Labour Relations Act. The next group of decisions to which I will refer served to clarify the parameters of the scheme, and to shatter a few fondly held illusions as well.

In some quarters there was the belief that bargaining rights would be extended by simple operation of the province-wide bargaining scheme. At the first opportunity the Board made it quite clear that the legislation merely provided for the consolidation in the bargaining agencies of those bargaining rights and obligations existing at the time of designation. No existing bargaining rights were lost and no new bargaining rights were created by the scheme. As a result an employer could only be bound by a provincial agreement to the extent that an affiliated bargaining agent had acquired bargaining rights in respect of the employees of that employer. [See United Brotherhood of Carpenters and Joiners of America, [1978] OLRB Rep. Aug. 776; see also George Wimpey (Canada) Ltd. (1978), 79 CLLC ¶16,175 (OLRB).]

Among some on both the management and union sides there also existed expectations that the scheme of province-wide bargaining would alter the Board's practice of defining bargaining units in the construction industry. On the management side there were those who expected that the Board would confine its certificate to a single sector of the construction industry, while on the union side some expected that the Board would grant province-wide certificates rather than area certificates. Neither set of expectations were realized. The Board in two key decisions made it clear that it was business as usual when describing construction bargaining units. [Lyle West Electric Ltd., File No. 0745-78-R; Zimmcor Co., File No. 0514-78-R.] Since the 1977 amendments to the Act made no reference to the determination of appropriate bargaining units, in the Board's view, there was no statutory mandate to alter its existing practice in either way.

A few other Board decisions should be mentioned in passing before I conclude. The Board has decided that a designated employee bargaining agency is a trade union for all purposes of the Act and, at least in theory, it could acquire local bargaining rights in its own name. [Courtland Electric Ltd., File No. 0696-78-R.] As the Board pointed out, however, the constitution of a designated employee bargaining agency might not permit it to have any individual members so that it could not meet the requirement for certification of having employees as members.

A more recent problem facing the Board is the determination of when bargaining rights become so stale as to lose their force. Since the scheme of province-wide bargaining consolidates all existing bargaining rights and plugs them into a provincial agreement, the issue is whether bargaining rights once acquired can be lost through disuse. In two very recent decisions the Board reaffirmed that

bargaining rights can be abandoned. [J.S. Mechanical, File No. 1677-78- ; John Entwhistle Construction Ltd., File No. 1755-78-M.] The determination of whether bargaining rights have been abandoned is essentially a question of fact to be decided on a case-by-case basis. Such factors as the length of the bargaining agent's inactivity, the degree of inactivity, the existence of extenuating circumstances justifying such activity, are all taken into account.

At this point I think that it is fair to conclude that the scheme of province-wide bargaining for the industrial, commercial, and institutional sector of the construction industry is firmly in place. The structure has survived one round of bargaining, and by now the basic ground rules should be known to all participants. Although the structure is by no means perfect, it is at least a substantial step in the direction of a more rational bargaining structure for the construction industry.